

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 05-255
Competition in the Market for the)	
Delivery of Video Programming)	

To: The Commission (filed electronically)

COMMENTS OF THE COMMUNITY BROADCASTERS ASSOCIATION

1. The Community Broadcasters Association (“CBA”) hereby submits these Comments in response to the Commission’s Notice of Inquiry (“NOI”) in the above-captioned matter, FCC 05-155, released August 12, 2005. CBA is the trade association of the nation’s Class A and Low Power Television (“LPTV”) stations and represents the interests of those stations in legislative, regulatory, and judicial forums.

2. The purpose of the NOI, as mandated by Congress, is to evaluate the state of competition in the delivery of video programming market and to determine whether legislative or regulatory changes could increase competition. Class A and LPTV stations are especially sensitive to these competitive issues because: (i) most of them do not have mandatory carriage rights on cable television,¹ (ii) none have mandatory carriage rights on broadcast satellites and (iii) Multichannel Video Program Distributors (“MVPDs”) are not required to negotiate in good faith with Class A and LPTV stations regarding retransmission consent.² These stations feel the brunt of the *de facto*, if not *de jure*, monopoly power of MVPDs every day.

¹ Under Sections 614(h)(2)(E) and (F) of the Communications Act of 1934, as amended (the “Communications Act”, a Class A or LPTV station does not have must carry rights if it is licensed to either (i) a community within the top 160 Metropolitan Statistical Areas as defined by the Office of Management and Budget as of June 30, 1990 and whose population was over 35,000 persons as of that date, or (ii) a community in a county that has a full power television station.

² See Sec. 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”).

3. The Class A and LPTV industries are distinctive in that: (i) they are not dominated by large, multiple station owners; (ii) they have a wide variety of station owners, including minority, female and other owner groups whose representation falls short of their percentage of the general population; and (iii) they are notable for their individualized local programming. In fact, the Class A television service is the only class of broadcast service required by statute to broadcast a minimum amount of locally produced programming.³ Class A and LPTV stations are also often licensed to small communities that cannot economically support a full power station, or they serve niche audiences in larger communities, such as foreign language speaking audiences who might not fully understand English language emergency warnings. Class A and LPTV stations are thus in a unique position to provide critical, locally pinpointed information, including emergency information, to viewers who might not otherwise have access to that information.⁴ With the increased emphasis now being placed on localism,⁵ the Commission and Congress should take steps to make sure that the service that has the most local character is not cut off from the dominant media distribution technologies.

4. While the Commission may celebrate increases in competition by virtue of the growth of broadcast satellite systems, Open Video Systems, and new broadband wired and wireless technologies, the newest technologies do not have broadcast carriage obligations, at least so far; so they do not increase the ability of local video program producers to reach the public. Moreover, the dominant technologies by far, cable television and broadcast satellite, have a

³ See Sec. 336(f)(2)(A)(i)(II) of the Communications Act.

⁴ An example of a situation where a Class A station provided critical, local community focused information not available elsewhere is WWCI-CA, Vero Beach, Florida broadcasts during last year's hurricanes. WWCI-CA's programming served as the focus of emergency information distribution for a community that has no other local television service and otherwise would have had to rely on regional full power stations that had time for only passing references to specific Vero Beach emergency details.

⁵ See *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 22813, FCC 04-129, MM Docket No. 04-233 (2004).

virtual total monopoly in the households they serve, because when those technologies are installed, over-the-air receiving antennas are almost always dismantled. As a result, once a cable system is hooked up, for example, the cable operator from that point forward has a 100% bottleneck over viewing in that household. The cable operator may not have a monopoly throughout the community, but it has an absolute monopoly over video programming delivery to each receiver it serves. This monopoly is real to the owner of the TV receiver, and it stifles any program producer that the cable operator cares to ignore and thus interferes with the Commission's goal of promoting localism. For most Class A and LPTV operators, it makes the statistic that 13-19% of households view TV over the air⁶ meaningless, as virtually all of the viewers of most Class A and LPTV stations view them over-the-air.

5. Short of providing full must-carry rights for local Class A and LPTV stations, Congress could ameliorate the bottleneck situation by repealing Section 614(e) of the Communications Act, which required the Commission to withdraw its A/B switch rule. That action would allow the Commission to require cable and broadcast satellite operators to allow their subscribers to supplement wired service with over-the-air reception.

6. There should be ample room on cable systems to carry local Class A and LPTV stations, especially with the advent of digital cable technology that enables a cable operator to deliver 1,000 or more channels. It is amazing how often cable operators tell Class A and LPTV stations that they have no available channel capacity one day, and then a week later they add some other new channel because the cable operators have an ownership interest in, or receive a generous fee from, that channel. Congress and the Commission could help expose the thinness of cable's claim of no capacity by amending Section 325(b)(7)(B) of the Communications Act, which exempts Class A and LPTV stations from the reciprocal good faith retransmission consent

⁶ See NOI at par. 66.

bargaining requirements established by Sec. 207 of SHVERA. That way, Class A and LPTV stations seeking retransmission consent agreements with MVPDs could take advantage of the established good faith bargaining compliant procedures and call MVPDs to task for inconsistent claims regarding channel availability. Although this change might not directly lead to an increase in the distribution of valuable local programming, it would be a step in the right direction.

7. In light of the unique capabilities of Class A and LPTV stations, it seems incongruous for the FCC to focus on localism, yet not open a new window for LPTV stations to apply for Class A status. There are many LPTV stations that have developed significant local programming since the original Class A eligibility window.⁷ If the Commission's goal is truly to create a vibrant, stable video programming service whose licensees connect with their local viewers, it should take advantage of the explicit opportunity provided by Congress,⁸ but so far by-passed by the Commission, to open a new Class A eligibility window.

8. Finally, it is disgraceful that the Commission has refused to act on RM-10335, a petition by Venture Technologies Group, Inc. to apply network and syndicated exclusivity rules to Class A and LPTV stations.⁹ There is no justification for allowing cable television systems to interfere with the programming marketplace and the privately negotiated economic rights of broadcast stations in the manner that they do, by importing distant stations that carry programming to which a local Class A or LPTV station has exclusive contractual rights. The Rules permit exclusivity to be asserted only if a network or syndicator grants exclusive rights to the broadcaster by contract, and the broadcaster shows the contract language to the cable

⁷ See Sec. 336(f)(2)(A)(i) of the Communications Act.

⁸ See Sec. 336(f)(2)(B) of the Communications Act.

⁹ The petition was placed on Public Notice on November 19, 2001. See Report No. 2513.

operator. If the network refuses to grant exclusive rights, the local broadcaster cannot interfere with duplicative distant signal importation. The programming is private property, and the local broadcaster acquires whatever rights it can. The owner of the program and the parties who bargained for the right to use it should be free to decide on the scope of the right conveyed pursuant to their bargain. The existing system is so unbalanced that while the network can forbid the local broadcaster from displaying the program more than once, it cannot prevent display by a cable operator with whom it has transacted no business at all; and the cable operator is able to engage in this abuse by virtue of a government-granted statutory compulsory copyright license. Nearly four years have passed since the petition was placed on Public Notice and the Class A and LPTV industry has yet to have this inequity addressed by the Commission.

9. The Commission's inaction on RM-10335 runs contrary to free enterprise economics and the Commission's own words, spoken just a few days ago in its Report to Congress on Retransmission Consent and Exclusivity Rules, released September 8, 2005. In declining to grant requests by cable operators to modify the existing network non-duplication and syndicated exclusivity rules to supersede programming contracts entered into by networks and broadcasters, the Commission stated, at par. 50, that:

the network non-duplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives.... [T]he Commission has a longstanding policy favoring the provision of local broadcast service to communities, and the Commission expects and indeed requires broadcasters to serve the needs and interests of their local communities. Except in cases where a contract violates the Commission's rules, we do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their

communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals.

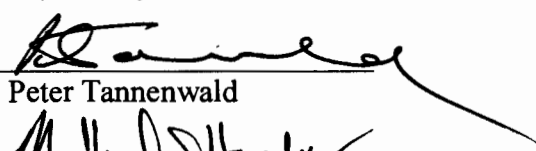

In other words, the Commission appears to be speaking out of both sides of its mouth, and its inaction on RM-10335 is both inconsistent with its own report to Congress and an unacceptable slap in the face to locally-oriented Class A and LPTV stations.

10. In sum, if the Commission's goals are the promotion of competition and localism, then the Commission must view competition in all its aspects, not just in the macro-sense involving nationwide statistics but also in the micro-sense of the individual television household, where competition is much less prevalent. On the localism side, there are clearly simple steps that Congress could take to increase the distribution of local Class A and LPTV programming, or at least to remove artificial obstacles to distribution. Finally, it is long past time to recognize privately negotiated contractual rights and to grant the relief requested in RM-10335.

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September 19, 2005

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Mary Jane Thomson, do hereby certify that I have, this 19th day of September, 2005, caused to be sent by First Class United States mail, postage prepaid, a copy of the foregoing "Comments of the Community Broadcasters Association" to the following:

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A handwritten signature in cursive script that reads "Mary Jane Thomson". The signature is written in dark ink and is positioned above a horizontal line.

Mary Jane Thomson